

LEGAL ASPECTS OF ASSESSING AND USING DEVELOPER IMPACT FEES

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- **The Police Power is the Fundamental Basis for All Land Use Regulation - Including Fees and Exactions**
 - A regulation must be reasonably related to protecting or sustaining the public health, safety, welfare and morals
 - This sets a relatively low bar for a governmental agency to sustain a regulation rooted in the police power
 - The challenger has the burden of proof and it is a heavy burden

- **Development is a Privilege For Which Developments Can be Made to Pay**
- *Associated Home Builders v. City of Walnut Creek (1971)*
4 Cal.3d 633
 - Municipality may require dedication of property to benefit general welfare
 - Not just strictly related to impacts of the property - acquisition of facilities elsewhere may be appropriate
 - Need caused by present and future subdivisions
 - Is there a double taxation problem?
 - Newcomers pay for new facilities and pay taxes for existing facilities
 - Unfairness to new residents versus existing? Vice versa?
 - Newcomers use old facilities and vice versa

• **Types of Exactions**

- Dedication of property
- Construction of facilities
- Payment of fees
 - Legislative program
 - Ad hoc application to project

- **Exactions and Fees Have a Higher Burden to be Sustained Than Other Police Power Regulations**
 - Exactions must be reasonable
 - Exactions must have a nexus with the impacts of the proposed development
 - Exactions must be rough proportionality to the impacts of the proposed development

• Nexus

- *Nollan v. California Coastal Commission* (1987) 483 U.S. 825: Blocking views of the ocean does not justify requirement to provide land for a pedestrian pathway to the beach
- Nexus is a connection between the impact and the proposed regulation; ad hoc, fact-based analysis
- If there is no nexus, the regulation is an unconstitutional taking
- Nexus requirement may be tighter where exaction requires dedication of land (higher scrutiny)
- Regardless of the level of scrutiny, evidence and findings are key to ensuring that an exaction is upheld against challenge

• **Rough Proportionality**

- *Dolan v. Tigard* (1994) 512 U.S. 374: Parking lot expansion does not necessitate bike path and flood control improvements at the level required
- City has burden to make findings supported by substantial record evidence to demonstrate that the nexus and rough proportionality exists
- Developer has burden to show substantial evidence does not support conclusions reached in findings
- If any evidence supports the agency's findings and conclusions, they are generally upheld, therefore even with the heightened burden it is still an uphill battle to challenge an exaction or impact fee

• **Nexus and Impact Fees in California**

- *Erlich v. City of Culver City* (1996) 12 Cal.4th 854: Incorporated *Nollan* and *Dolan* into California state court jurisprudence
- Nexus and rough proportionality and heightened scrutiny apply to an impact fee adopted pursuant to California law
- Scrutiny particularly high in the case of an ad hoc fee, assessed against an individual project only (as opposed to a fee assessed as part of a regular, legislatively adopted program)
- Adoption of a fee program is a legislative act subject to initiative and referendum, but application of a fee to a particular project is administrative and not subject to voter action

• **Mitigation Fee Act**

- California Government Code sections 66000, *et seq.*
- Codifies nexus and rough proportionality and sets up procedures for adopting and protesting impact fees (mitigation of impacts)
- Requires fee to be reasonable (reasonable relationship between fee and impact or cost of mitigating the impact) (*Nollan, Dolan*)
- Sets up pay and protest procedure
 - Allows project to proceed while issue of the fee is decided

• **Summary of Judicial Scrutiny of Exactions and Fees**

- Higher
 - Requirement to dedicate land
 - Requirement to pay an ad hoc fee
- Lower
 - Requirement to construct improvements
 - Adoption of legislative fee program or application of a fee based on a legislative fee program
- Documentation and substantial evidence is always critical, but it is particularly so regarding activities subject to higher scrutiny.

• **School Fees – SB50**

- State law limits amount of school impact fees that may be charged and sets procedure for a community to adopt fees
- Applies to legislative and administrative actions
- Specific prohibition on agencies disapproving or conditioning project on payment of school fees above statutory maximums
- Specifically applies to and limits mitigation that may be imposed under CEQA
- Very powerful statute – the most powerful in this context

• **Quimby Act**

- Part of Subdivision Map Act
- Limits the amount of park land that may be required for dedication, and if land is dedicated, limits or prohibits the imposition or exaction of park impact fees
- Requires jurisdiction to reimburse subdivider for park improvements
- This was the statute discussed in *Associated Homebuilders*
- Today it constitutes one of the few express limits on exactions.

• **Proposition 218**

- Key Distinction
 - Proposition 218 affects charges incident to property ownership, therefore fees and exactions as conditions of development are generally not affected
- Voter approval required for locally imposed special assessments and certain fees and charges related to property ownership
- 50 percent approval for general tax, 2/3 approval for special tax
- Fees pursuant to the tax may not exceed the cost of service
- If challenged, government has burden to prove that the fees are legal
 - Proper procedures were followed
 - Nexus, substantial record evidence, and findings all support the assessment, fee or charge

- CFDs and GHADs

- Statutory means to leverage future revenue stream from assessments or charges for current infrastructure and improvements by selling bonds secured by future revenue stream
- Assessments are paid over time, typically by homebuyers
- Widely used
- Statute is very permissive; can use for nearly all kinds of capital improvements
 - Cannot use for services or long-term operation and maintenance